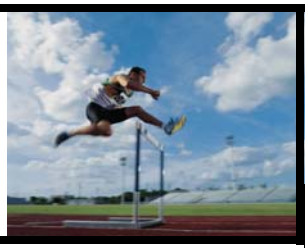
Field Advisory Services (FAS)

FASTRACK

Number 2004-2, May-June 2004



"Marriage" and "Spouse" Defined for Federal Employee Retirement & Insurance Benefits

Benefits and Entitlements E-mail us

Federal employee retirement and insurance benefits are subject to title 1, United States Code (U.S.C.), Section 7, as enacted by the Defense of Marriage Act, Public Law 104-199, 110 Stat. 2419 (September 21, 1996). Public Law 104-199 defines "marriage" and "spouse" as follows:

> "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

As a result, Public Law 104-199 precludes recognizing same-sex marriages for benefit purposes. Affected programs include the Federal Employees Retirement System (FERS), Civil Service Retirement System (CSRS), Federal Employees Health Benefits Program (FEHB), Federal Long Term Care Insurance Program (FLTCIP), and Federal Employees Group Life Insurance Program (FEGLI). Federal law takes precedence over city, county, or state laws that may recognize same-sex marriages.

Common-law marriages are also subject to Public Law 104-199. Common-law spouses are not recognized as spouses for benefits payable from the Civil Service Retirement and Disability Fund. This fund covers both FERS and CSRS employees.

Common-law spouses are included in the definition of "family member" for FEHB and FLTCIP purposes only if the employee resides in a state that recognizes such marriages. FEGLI does not recognize common-law marriages when distributing funds according to the standard order of precedence set forth in 5 U.S.C. 8705(a).

An employee who wants to leave FEGLI benefits to a same-sex partner, common-law spouse, or other person may complete a Standard Form 2823, Designation of Beneficiary. In block B, the employee may name that person as beneficiary.

More Categories of Employees Eligible for Federal Long Term Care Insurance Program (FLTCIP)

Benefits and Entitlements E-mail us

Recent legislation broadens employee eligibility for the Federal Long Term Care Insurance Program as outlined in 5 U.S. C. 9001(1). The pertinent provision is the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004, Section 561 (Public Law 180-136, 117 Stat. 1392-1629), November 24, 2003. Employees (and their qualified relatives) now eligible to enroll in the program include the following:

(Continued on page 2)

FASTRACK has a new look!

- A new feature, "CPMS Personnel-ity Profile," will acquaint you with us in CPMS and personalize the service we provide our customers
- E-mail us your thoughts on the new look and feature

Inside this issue:

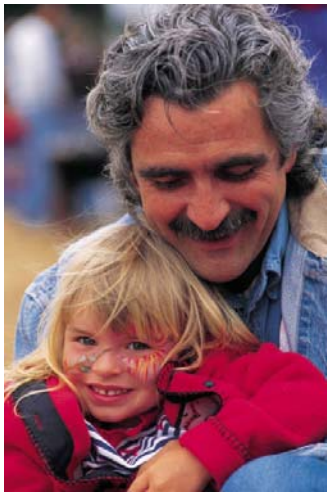
"Cherry blossoms are just one of Washington's scenic wonders," says FAS staff member Jean Stewart *(See article, page 6).*

More Eligible for Federal Long Term Care Insurance Program (FLTCIP)

(Continued from page 1)

- District of Columbia (DC) Government employees who were first employed by the DC Government before October 1, 1987;
- Former Federal employees vested in a retirement system who separated before attaining the minimum age for title to annuity; and
- Reservists transferred to the Retired Reserve who are under age 60, even though they are not yet receiving retirement pay.

These employees have the same access to coverage for eligible family members as previously covered employees. Thus, a DC Government employee now eligible to participate in FLTCIP may also enroll his or her spouse, a parent, stepparent, parent-in-law, or child. The term "qualified relatives" is defined at 5 U.S.C. 9001(5). Additional FLTCIP information is available on the CPMS website: http://www.cpms.osd.mil/fas/benefits/be_fltci.htm.



Former Federal employees vested in a retirement system who separated before attaining the minimum age for title to annuity may now enroll in FLTCIP.

Federal Labor Relations Authority Applies *De Minimis* Standard to Substantively Negotiable Issues

Labor and Employee Relations E-mail us

When the Federal Labor Relations Authority (FLRA) finds that a proposed change in bargaining unit employees' conditions of employment is insignificant (or *de minimis*), management is not required to bargain on the matter (see *United States Department of the Treasury, Internal Revenue Service*, 56 FLRA 906 (2000)). Until recently, FLRA had applied the *de minimis* standard only to bargaining over the exercise of a management right under 5 U.S.C. 7106. The FLRA now finds that the *de minimis* standard applies to changes in conditions of employment that are substantively negotiable, as well as those that involve the exercise of a management right. The precedent-setting case is *Social Security Administration (SSA), Office of Hearings and Appeals*, 59 FLRA 646 (February 19, 2004).

In 59 FLRA 646, an Administrative Law Judge ruled that management committed an unfair labor practice by failing to bargain over a substantively negotiable issue, i.e., employee parking. The Judge rejected SSA's position that the matter was outside the scope of bargaining because the change was *de minimis*. SSA filed exceptions to the Authority, arguing that the *de minimis* standard should also apply to bargaining that does not involve the exercise of management rights.

The FLRA invited amicus curiae briefs. The Departments of Defense and Labor, the American Federation of Government Employees, the National Treasury Employees Union and the AFL-CIO all responded.

Ultimately, the FLRA determined that the legislative history of the Federal Service Labor-Management Relations Statute supports its new ruling that the duty to bargain involves a finding of "substantial impact" resulting from a proposed change. The FLRA's earlier rationale for limiting the "substantial impact" or *de minimis* standard to management's rights bargaining was unclear and will no longer be followed.

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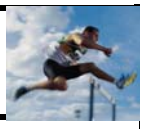


U.S. Court of Appeals for the Federal Circuit Rules That Absolute Performance Standards Are No Longer Forbidden

Labor and Employee Relations E-mail us

A recent decision by the U.S. Court of Appeals for the Federal Circuit will affect how "absolute" performance standards are used in employee performance plans. In *Cynthia A. Guillebeau v. Department of the Navy*, Fed. Cir. No. 03-3220 (March 24, 2004), the Court upheld the use of absolute performance standards for Federal employees. Absolute standards are ones in which a single instance of poor performance must result in an unsatisfactory rating on a critical performance element.

The case involved a Department of the Navy (DON) engineer who was required to develop web pages for her installation. Ms. Guillebeau was removed for unsatisfactory performance, because she failed to meet the performance standard that all web pages must be peer reviewed and conform to a specified format. The Federal Circuit Court of Appeals rejected the DON argument that the performance standard was not an absolute standard. The Court ruled that the use of the word "all" does make it an absolute performance standard.

Since 1984, the Merit Systems Protection Board (MSPB) has barred the use of absolute performance standards, except in cases involving death, injury, breach of security, or great monetary loss. (See *Callaway v. Department of the Army*, 23 M. S.P.R.592 (1984) (*Callaway*).) In deciding the Guillebeau case, the Court reviewed the original statute on the establishment of performance standards, the 1978 Civil Service Reform Act. The Court questioned whether the law, and not subsequent MSPB interpretations of the law, bars the use of absolute performance standards.

The Court held that the statute does not bar absolute performance standards, and it specifically disapproved of the Board's decision in the *Callaway* line of cases. The Court further held that an extensive body of law, both in the Federal Circuit and at the Board, held that "performance standards must be reasonable, based on objective criteria, and communicated to the employee in advance."

The Court ruled that absolute performance standards are not always reasonable, but in this case, the performance standard was implemented in a reasonable manner. The appellant lost because she did not argue that the performance standard was invalid because it was unreasonable, but only that it was invalid because it was absolute.

In view of this case, supervisors, managers, and human resources specialists should make the case that their actions are reasonable and should focus on proving that the employee did not perform the work in a timely and efficient manner, and did not meet quality and quantity standards.

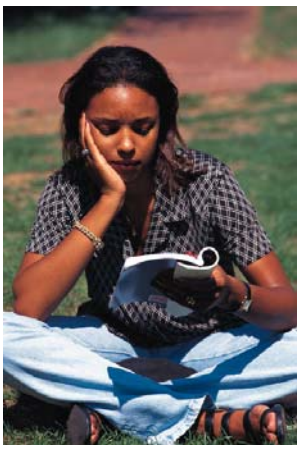
Changes in Law Strengthen Student Loan Repayment Program

Classification and Pay E-mail us

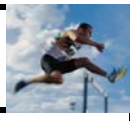
Federal government supervisors may now offer highly qualified candidates or current employees up to $10,000 in student loan repayments each calendar year, with an agency lifetime maximum of $60,000 per employee. The previous limits were $6,000 and $40,000, respectively.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004, Section 1123 (Public Law 108-136, 117 Stat. 1392-1629), November 24, 2003, along with the Federal Employee Student Loan Assistance Act, Public Law 108-123, 117 Stat. 1345 (November 11, 2003), amended 5 U.S.C. 5379. These two Acts significantly increased the value of the student loan repayment program as a recruitment and retention tool.

Additionally, the Office of Personnel Management (OPM) has established a new nature of action code (NOAC) 817 to document student loan repayment approvals and ease compliance with the reporting requirements of 5 U.S.C. 5379. This NOAC, which will become available for Component input in June 2004, should be processed in the Defense Civilian Personnel Data System (DCPDS) according to the instructions issued with Patch 53.



DoD 1400.25-M, Civilian Personnel Manual, is being updated with a new subchapter 537 covering the student loan repayment program. The new subchapter will incorporate program implementation policies and procedures.



New Overtime Rate for Some Employees Who Are Exempt from the Fair Labor Standards Act (FLSA)

Classification and Pay E-mail us

A new provision of law changes the method of calculating overtime pay for General Schedule (GS) employees who are exempt from the Fair Labor Standards Act (FLSA) and whose rate of basic pay (including locality pay) is more than the locality-adjusted rate for GS-10, step 1. The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004, Section 1121 (Public Law 108-136, 117 Stat. 1392-1629), November 24, 2003, amended 5 U.S.C. 5542(a)(2) and changed overtime pay entitlements for these employees.

Their overtime pay entitlement is now an amount equal to the **greater** of: one-and-one-half times the hourly rate of basic pay for GS-10, step 1 (including locality pay); or the employee's hourly rate of pay. This change ensures that these employees will receive no less than their regular rate of pay for overtime worked.

NOTE: This change does **not** affect firefighters who work an average of at least 106 hours per pay period. Specific overtime pay calculations for these firefighters are contained in 5 U.S.C. 5542(f). That Section, which was not affected by the change to 5 U.S.C. 5542(a)(2), provides that firefighters will not receive less than the firefighter hourly rate of pay (annual salary divided by 2,756) for overtime hours worked.

The new overtime calculation methodology does not affect firefighters who work an average of at least 106 hours per pay period.

OSHA Standards Are Established as Criteria for Payment of Differentials for Asbestos Exposure

Classification and Pay E-mail us

Differential payments for asbestos exposure must now be based on standards issued by the Occupational Safety and Health Administration (OSHA). The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004, Section 1122 (Public Law 108-136, 117 Stat. 1392-1629), November 24, 2003, established the OSHA standards as the criteria for such differential payments.

Previously, OPM issued regulations for Federal Wage System (FWS) employees to receive environmental differential pay, and GS employees to receive hazardous duty pay, based on asbestos exposure. The regulatory process resulted in different requirements for payment of differentials to the two categories of employee. Section 1122 of Public Law 108-136 eliminates this disparity.

The amendment also requires that all related administrative or judicial determinations regarding back pay entitlements after the date of enactment be based on the OSHA standard. Any claims, grievances, or arbitrations currently ongoing must apply the OSHA standard, no matter when the claimed exposure occurred.

An OPM memorandum to Human Resources Directors (CPM-2003-21, Recent Legislative Changes, December 24, 2003) noted that OPM's regulations regarding the differential for GS employees already reflect this requirement and that OPM plans to update the regulations for FWS employees in the near future. The updated regulations are not necessary for the application of this new standard for FWS employees; the change in law is controlling.

Any claims, grievances, or arbitrations related to asbestos exposure that are currently ongoing must apply the OSHA standard, no matter when the claimed exposure occurred.

Military Leave for Activated Civilian Employees—Frequently Asked Questions

Classification and Pay E-mail us

Pay has been asked:

Q: Section 6323(b) of title 5, U.S.C., authorizes civilian employees called to active military duty in support of a contingency operation to use 22 days of military leave. Must these 22 days be taken consecutively?

A: No. There is no requirement that the 22 days be taken consecutively.

Q: How is the military leave charged?

A: Employees may be charged military leave only for days when the employee would otherwise have worked and received pay. The leave must be taken in workday increments.

Q: Are special incentives pay, such as hazardous duty pay, hostile duty pay, and other special pay and bonuses, included in the employee's gross military pay and allowances?

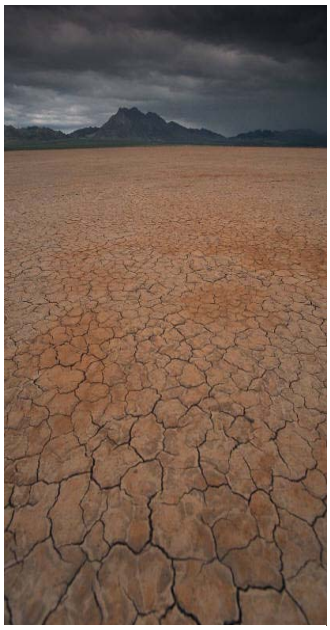
A: Yes. The pertinent provision of law, 5 U.S.C. 5519, states that:

> "an amount (other than travel, transportation, or per diem allowance) received by an employee or individual for military service as a member of the Reserve or National Guard for a period for which he is granted military leave under section 6323(b) or (c) shall be credited against the pay payable to the employee or individual with respect to his civilian position for that period."

Based on this provision, the only pay not included in the gross military pay and allowances for offset purposes is pay for travel, transportation, or per diem allowance.

Q: An employee who has been activated in support of a national emergency may also use 15 days of military leave available under 5 U.S.C. 6323(a). May the employee combine the 22 days of military leave discussed above with the 15 days of military leave available to employees called to active duty?

A: Yes. The 15 days as well as the 22 days of military leave are available under different title 5, U.S.C. authorities. An employee who has been activated in support of a national emergency may use the 15 days of military leave available under 5 U.S.C. 6323(a) and the 22 days of military leave available under 5 U.S.C. 6323(b) consecutively.



An employee activated in support of a national emergency may use 15 days of military leave under 5 U.S.C. 6323(a) and 22 days of military leave under 5 U.S.C. 6323 (b).

Equal Employment Opportunity Managers, Did You Know This?

Office of Complaint Investigations E-mail us

Complaint files can be transmitted electronically to the CPMS Office of Complaint Investigations (OCI). This file transfer (or "FileX") process allows complaint files and documentation to be forwarded to OCI through a secure website to which the customer and OCI have exclusive access. Once the investigation is completed, the file can be electronically returned to the customer. This process eliminates mailing time and facilitates OCI receiving files within 30 days of the date the complaint was filed.

OCI is available to facilitate resolutions and/or mediate EEO complaints with a certified mediator. OCI uses a variety of approaches, such as scheduled mediation sessions, standing monthly visits to take on pressing cases, and informal add-ons during scheduled site visits.

OCI settles about 33 percent of its formal cases and, for some customers, more than 80 percent of their informal complaints. For cases that are not resolved or mediated, a method called priority processing offers a way to get the complaint investigated sooner. For a complaint to receive priority processing, the file must be submitted to OCI with all required documentation as identified on OCI's website, contact information for the parties (including e-mail addresses and telephone numbers), and suggested dates when all parties are available for the investigation.

Are you intrigued by any of this? Do you have some process efficiencies that you want to share? Call Tom Trimble at 703-696-2749 (DSN 426-) for more information or to share your ideas.

CPMS Personnel-ity Profile

The Arts, the Outdoors, and the Federal Career: For Jean Stewart, the Washington, DC, Area Has It All

San Diego native Jean Stewart says, "I was a Navy kid. So when I came to Washington, I assumed I'd work for the Navy, but they slapped on a hiring freeze the day I hit town." A Yale alumna (Master of Political Science, plus three additional years of graduate study), Jean began her Federal career in 1969 with the Civil Service Commission, the predecessor of OPM.

Jean recalls with amusement that her father, a retired Chief Warrant Officer who fought in the South Pacific in World War II, "was kind of upset about it" when she later accepted a position with the Department of the Army. She has also served with the Defense Logistics Agency and Immigration and Naturalization Service in the Washington area. As an OPM classification standards writer in the early 1990s, Jean had three published standards to her credit. She joined CPMS in 1999.

One of the lesser-known advantages of the Washington area, she notes, is that "There are boodles of good hiking places," including Rock Creek Park in Washington, Great Falls and Shenandoah National Parks in Virginia, and Sugarloaf Mountain and the Billy Goat Trail in Maryland. Jean likes to capture scenic beauty on film: "Every so often, I send in photos to *Petersen's Photographic* magazine contest for professionals and advanced amateurs. I've twice gotten as far as the semi-finals."

Other interests include attending the Washington Mystics women's basketball and Orioles baseball games. Jean is also a Washington National Opera season ticket-holder and a soprano in a local choral society. Finally, she adds, "I belong to a play reading group" of about a dozen theater-loving amateurs who meet monthly for a potluck dinner and an unstaged reading. "We've got a collection of plays by Charles Busch, the author of *Tale of the Allergist's Wife*. The next one we'll read in this collection is *Red Scare on Sunset*."

As CPMS's Classification Policy Specialist, Jean notes that, "One of my great satisfactions is working on ad hoc teams with really great colleagues, and sometimes explaining classification or even arguing with them, but in a way that's fun. I always learn something from my colleagues, particularly from those who are not in my line of work." Participating on teams has "given me a new perspective on CPMS leadership, too. I see them now as more multi-dimensional." In all her assignments, Jean strives "to look at various issues from an overall human resources standpoint, and then try to come up with something that will not only help management, but also help employees. It's easier to manage when you have a happy workforce," she says with a smile.

WE'RE ON THE WEB!
http://www.cpms.osd.mil/fas/index.html

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Commitment to Duty

CPMS Employment Corner

CPMS job vacancies are posted on the Human Resources Operations Center (HROC) job opportunities web site at http://www.hr.dla.mil/onjams/splash.htm.

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